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DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 96-0025 ST
Sales and Use Tax
For the Period 1991 Through 1993

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales/Use Tax - Newspaper Subscription

Authority: IC 6-2.5-5-17; 45 IAC 2.2-5-26; Emmis Publishing Corp. v. Indiana Department of State Revenue, 612 N.E.2d 614 (Ind. Tax 1993).

The taxpayer protests sales tax assessed on its subscription of (name omitted).

II. Sales/Use Tax - Software Support Fee

Authority: IC 6-2.5-3-2.

The taxpayer protests use tax assessed on software support.

III. Sales/Use Tax - Reading Services

Authority: Information Bulletin #59.

The taxpayer protests sales tax assessed on advertising.

IV. Sales/Use Tax - General Ledger Dining Costs

Authority: IC 6-2.5-2-1; IC 6-2.5-5-20; Harlan Sprague Dawley v. Indiana Department of Revenue, 605 N.E.2d 1165 (Ind. Tax 1994); Knauf Fiber Glass v. State Board of Tax Commissioners, 629 N.E.2d 959, 961 (Ind. Tax 1994); Taxpayers Lobby of Indiana v. Orr, 311 N.E.2d 814 (1974); U.S. Air, Inc. v. Indiana Department of State Revenue, 627 N.E.2d 1386 (Ind. Tax 1989), aff'd. 582 N.E.2d 777 (Ind. 1991).

The taxpayer protests sales tax assessed on food provided at no charge to executives and clients.

V. Sales/Use Tax - Automobile Purchases

Authority: None.

The taxpayer protests sales tax assessed on the purchase of an automobile.

VI. Sales/Use Tax - Industry Reporting Services

Authority: 45 IAC 2.2-4-2.

The taxpayer protests sales tax assessed on the purchase of consulting services.

VII. Sales/Use Tax - Printed Materials

Authority: IC 6-2.5-1-1; IC 6-2.5-3-5**;** 45 IAC 2.2-4-2**;** Information Bulletin #54; D.H. Holmes v. McNamara, 108 S.Ct. 1619 (1988); Cowden and Sons Trucking v. Indiana Department of State Revenue, 575 N.E.2d 718, 720 (Ind. Tax Ct. 1991); Martin Marietta Corp. v. Indiana Department of State Revenue, 398 N.E.2d 1309 (Ind. App. Ct. 1979).

The taxpayer protests sales tax assessed on printed materials.

VIII. Sales/Use Tax - Printed Materials

Authority: Information Bulletin #54; D.H. Holmes v. McNamara, 108 S.Ct. 1619 (1988).

The taxpayer protests sales tax assessed on printed materials.

IX. Sales/Use Tax - Plant Maintenance Services

Authority: 45 IAC 2.2-4-2**.**

The taxpayer protests sales tax assessed on plant maintenance services.

STATEMENT OF FACTS

The taxpayer is a wholly owned subsidiary of X, a bank holding company. The taxpayer has numerous locations in Southern Indiana, with no locations outside Indiana.

More facts will be presented as necessary.

I. Sales/Use Tax - Newspaper Subscriptions

DISCUSSION

The taxpayer protests use tax assessed on the taxpayer's subscription of the (name omitted) publication, Exhibit A. The taxpayer asserts that its subscription to (name omitted) should be exempt from tax because it is entitled to exemption as a newspaper under IC 6-2.5-5-17 which states that, sales of newspapers are exempt from the state gross retail tax, and 45 IAC 2.2-5-26 which states in pertinent part:

> (a) General rule. In general, sales of all publications irrespective of format are taxable. The exemption provided by this rule is limited to sales of newspapers.
>
> (b) Application of general rule. For purposes of the state gross retail tax, the term newspaper means only those publications which are:
>
> > (1) commonly understood to be newspapers;
> >
> > (2) published for the dissemination of news of importance and of current interest to the general public, general news of the day, and information of current events;
> >
> > (3) circulated among the general public;
> >
> > (4) published at stated short intervals;
> >
> > (5) entered or are qualified to be admitted and entered as second class mail matter at a post office in the county where published; and
> >
> > (6) printed for resale and are sold.
>
> (c) Publications which are primarily devoted to matters of specialized interest such as . . . sporting matters may qualify for exemption if they also satisfy the criteria listed in subsection 26 of this rule *[subsection (b) of this section]*.

* * *

(e) Publications issued monthly, bimonthly, or at longer or irregular intervals are generally not considered to be newspapers.

* * *

(g) A preponderance of advertising, lack of authorization to carry legal advertising, or lack of a masthead setting forth the publisher, editor, circulation, and place of publication are characteristics of publications other than newspapers.

The taxpayer asserts that its publication is a newspaper because it meets the definition of a newspaper set out in 45 IAC 2.2-5-26(b).

The Indiana Tax Court, in Emmis Publishing Corp. v. Indiana Department of State Revenue, 612 N.E.2d 614 (Ind. Tax 1993) [hereinafter Emmis], interpreted and found 45 IAC 2.2-5-26(b)(2) to be null and void because it discriminated on the basis of speech content in violation of the First and Fourteenth Amendments to the United States Constitution and Article 1, Sec. 9 of the Indiana Constitution. Id. at 622-23. Therefore, the publication must be evaluated without reference to its content.

The Court cited with approval the remaining content-neutral characteristics of newspapers listed in 45 IAC 2.2-5-26 (b) and (g). Id. at 624. The Court noted that other states' courts and legislatures also evaluate the type of paper on which a publication is printed (e.g. newsprint). The Court further noted that the majority rule holds that publications printed less frequently than weekly are generally not considered newspapers. Yet, the Court cautioned that "[t]he frequency of publication standing alone, however, is not an infallible empirical measure of whether a publication is a newspaper." Id. at 625. Mindful of the Court's directives, the Department addresses the factual question of whether the publication at issue here is a newspaper. In order to determine whether the publication has these characteristics, the Department reviewed a copy of the August 8, 1996, edition of (name omitted).

1. Commonly Understood to be a Newspaper

Administrative Regulation 45 IAC 2.2-5-26(g) states, a preponderance of advertising, lack of authorization to carry legal advertising, or lack of a masthead setting forth the publisher, editor, and place of publication are characteristics of publications other than newspapers.

1. The publication does not have, a preponderance of advertising. Id. The publication consists of approximately 33% advertising, which is nearly one advertisement per page. Other newspapers contain similar amounts of advertisement. Magazines tend to have more advertisements than newspapers and more full pages dedicated strictly to advertisements;

2. The publication lacks authorization to carry legal advertising. Id. The Court in Emmis refers to legal notice provisions of IC 5-3-1-4(a), which defines the term "newspaper," in pertinent part:

> "Newspaper", as used in this chapter, means a weekly, semiweekly, tri-weekly, or daily newspaper of general circulation which has been published for at least three (3) consecutive years in the same city or town and entered, authorized, and accepted by the United States Postal Service for that period of time as mislabel matter of the second class as defined by 39 U.S.C. 3622 and which has at least fifty percent (50%) paid subscriptions....

3. The publication has a, masthead setting forth the publisher, editor, circulation, and place of publication." Id. On its front cover, the publication states its name, the volume and issue numbers, and the date. On its first inside page, it lists its publisher, editor, and place of publication;

The taxpayer's subscriptions meet elements 1 and 3 of material that is commonly understood to be a newspaper. In this case, the publications are commonly understood to be newspapers, meeting element 1 of the 45 IAC 2.2-5-26(b).

Circulated Among the General Public

The publications in question can be purchased by subscription or at newsstands. They are circulated among the general public.

Short Publishing Intervals

The publications are published on a daily basis, which satisfies as a short interval.

Qualified to be Entered as Second Class Mail

The publications are registered to be entered as second class mail meeting this requirement.

Printed for Resale

The publications are printed for resale, they are not provided for free.

All elements of 45 IAC 2.2-5-26(b) are met. Therefore, the publication at issue is applicable for the newspaper exemption from sales and use tax.

FINDING

The taxpayer's protest is sustained.

II. Sales/Use Tax - Software Support Fee

DISCUSSION

The taxpayer protests use tax assessed on a software support maintenance contract between the taxpayer and Z, Exhibit B. The taxpayer provided the Department with an invoice which states, software maintenance fee. The taxpayer claims that the fee is an optional agreement with Z to provide technical support services such as telephone support and troubleshooting to the taxpayer's personnel. The taxpayer claims that since the maintenance agreement was purchased separate from the software and was an optional purchase, it is a sale of a service and is separate from the sale of the software.

The taxpayer provided the Department with a contract that is labeled, Software Product Exhibit (Exhibit B). Although the contract states that it is to be read in conjunction with the Software License Agreement, the contract is unclear that it is offering only support under this contract. The contract appears to be a license agreement rather than a contract for support services. The taxpayer was unable to provide the Department with the original license agreement.

Under IC 6-2.5-3-2, use tax must be paid on the use of property in Indiana when sales tax was originally due but not paid.

FINDING

The taxpayer's protest is denied.

III. Sales/Use Tax - Reading Services

DISCUSSION

The audit division assessed use tax on an invoice from E (Exhibits C&D) that states, reading services. The taxpayer claims that the fee was for display advertising. For a fee, the taxpayer's company name is printed, along with many other companies names, on plastic magazine covers that are placed over magazines in doctors' offices. The taxpayer does not own, rent or control the magazines. It also does not know which other companies will be advertised along with it. The taxpayer claims that the transaction is exempt as display advertising, similar to advertising on a billboards.

Information Bulletin #59 (October 1991) addresses advertising, stating in pertinent part:

> The taxability of billboards and advertising signs for sales tax purposes requires a determination whether the rental of the advertising space is the rental of tangible personal property or the sale of a service.

> The key element to look at in determining whether the transaction is a rental or a service is who controls the property. If the person paying for the use of the advertising space controls the space then the transaction is a rental of the space and is taxable. If the person using the property does not control the property then the transaction is a service.
>
> The person paying for the use of the space has control when that person can determine the location of the advertising space or has the right to direct how the advertising space will be used. The person using the space must have exclusive use of the space before the person controls the space. Other factors indicating control are whether the customer provides upkeep and maintenance of the space, and whether the customer pays for the posting of the advertised material.

In this case, the taxpayer pays E to place its company name and logo on various magazine covers in various doctors' offices. The taxpayer does not own or control the space that is being used. E determines where on the cover to place the taxpayer's name and logo and with whom the taxpayer will share the cover. There are usually several different company's names on the covers. The taxpayer has no control over how the advertising space will be used. Additionally, the taxpayer does not pay for the upkeep and maintenance of the covers. E is entirely responsible of distributing, placing, maintaining, and removing the magazines and their covers. The taxpayer does not have control over the advertising space, and therefore, purchased a service, not tangible personal property.

FINDING

The taxpayer's protest is sustained.

IV. Sales/Use Tax - General Ledger Dining Costs

DISCUSSION

The taxpayer provides a full service cafeteria for its employees and their guests and collected sales tax on all food sold. The taxpayer also operated a separate cooking and dining area that was used for serving executives and clients. The taxpayer expensed the meals and the overhead of the dining room to the departments that used it. Since the taxpayer did not charge for the meals, it did not collect sales tax on food. The audit division assessed use tax on the entire amount expensed to the various departments which was listed in the taxpayer's general ledger as, employee and customer food and beverages. First, the taxpayer protests the use tax assessed on food provided free of charge to executives and guests. Second, the taxpayer protests the amount upon which the use tax is based, claiming that if use tax applies, it should only be assessed against the cost of the meals, not the overhead expenses.

The taxpayer protests the assessed use tax on food provided free of charge

The taxpayer claims that the food it purchases from the grocery store is exempt from sales tax under IC 6-2.5-5-20 because it is food purchased for human consumption. The taxpayer also asserts that food prepared and provided free of charge to its own employees and guests is exempt from being a retail transaction.

The taxpayer claims that when originally purchased from the grocery store, the food is exempt from sales tax because it is purchased for human consumption. Indiana Code 6-2.5-5-20 states in pertinent part:

> (a) Sales of food for human consumption are exempt from the state gross retail tax.
> (b) For the purposes of this section, the term food for human consumption includes:
> (1) cereals and cereal products;
> (2) milk and milk products, including ice cream;
> (3) meat and meat products; etc.
>
> (c) For purposes of this section, the term food for human consumption does not include:
>
> (8) food furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant; etc.

The taxpayer claims that since it does not sell the food, it is not a retail merchant, there is no retail transaction, and therefore, IC 6-2.5-5-20(c)(8) does not apply. The taxpayer states that there is no consideration, and without consideration, there can be no retail transaction. The taxpayer charges each department back for each meal provided estimated to include not only the cost of the food, but the payroll, benefits, and overhead of the dining room and kitchen. The auditor assessed use tax against this entire general ledger amount.

The taxpayer elaborates by stating that the corporation buying and using groceries is no different than an individual buying and using groceries in his home. If the Department taxes the corporation, it would also have to tax the individual for all use of groceries in the home.

Under IC 6-2.5-2-1, an excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana. The taxpayer buys food at retail. Therefore, absent an applicable exemption, the taxpayer's food purchases are taxable. Since the taxpayer is claiming an exemption, it bears the burden of proving that the terms of the exemption are met. Harlan Sprague Dawley v. Indiana Department of Revenue, 605 N.E.2d 1165 (Ind. Tax 1994).

The taxpayer operates a cafeteria and is a retail merchant. Since it is a retail merchant, and in the executive dining room, prepares and furnishes food for consumption at its location, the food it purchases is not food for human consumption under IC 6-2.5-5-20(c)(8).

Furthermore, in interpreting Indiana statutes, the court's foremost goal is ascertaining the legislature's true intent. Knauf Fiber Glass v. State Board of Tax Commissioners, 629 N.E.2d 959, 961 (Ind. Tax 1994). In Taxpayers Lobby of Indiana v. Orr, 311 N.E.2d 814 (1974), the Indiana Supreme Court found that the legislative purpose in enacting the food and consumption tax exemption, was to provide an exemption for groceries in order to mitigate the regressively of sales tax by exempting food necessities and staples. The Court cited a leading authority on sales tax who stressed the importance of the food exemption in reducing the tax burden on the poor. Id. at 817. The Court further illustrated this idea by stating, The items excluded from exemption are basically nonstaple food items or food items served for the purpose of eating out. Id. at 818.

Before allowing the exemption, the Department must evaluate whether the taxpayer's purchases fit within the statute's intent. In this case, the Department must decide whether exempting these food purchases mitigate the regressiveness of the sales tax and whether the application of the exemption would lessen the tax burden on the poor. Here, there is no indication that the taxpayer is in the class of people that the exemption was designed to benefit. Applying this exemption to the taxpayer will not mitigate the regressiveness of sales tax or benefit a member of the poor society.

The case at hand is similar to the situation in U.S. Air, Inc. v. Indiana Department of State Revenue, 627 N.E.2d 1386 (Ind. Tax 1989), aff'd. 582 N.E.2d 777 (Ind. 1991). In U.S. Air, the Court found that food purchased and provided free of charge to crew and customers was not purchased for resale and therefore not subject to the gross retail sales tax. However, the Court did find that the food was not entitled to the food for human consumption exemption under IC 6-2.5-5-20. The Court looked at the true intent of the statute and determined that U.S. Air was not the class intended to benefit from the exemption. Id. At 1038.

In summary, the taxpayer is a retail merchant and is not entitled to the food for human consumption exemption under IC 6-2.5-5-20(c)(8).

The Amount Upon Which Use Tax is Based

The taxpayer asserts that if use tax is going to be assessed, that the tax be based on the cost of the actual food. The taxpayer claims that the audit division assessed use tax on the general ledger amount which is an inflated amount in excess of actual food costs. The taxpayer claims that when an executive obtains a meal, the amount charged is typically a set amount (ie: $4.75-$5.25 per meal) which includes not only the actual cost of the meal, but also costs of payroll, labor, management fees, and other non-taxable services provided by the taxpayer. Once a meal is provided at no charge, the taxpayer bills the department that obtains the meal and includes overhead and the other fees.

The taxpayer asserts that the true cost of food provided at no charge in 1993 was 71.14% of the total amount ledgered. The taxpayer provided a breakdown between the cost of food and the amount the auditor used to determine tax for 1993. Thus, 29% of the executive dining sales

charged to the general ledger account represent the non-taxable cost of labor, payroll, and other services.

In this case, food was provided at no charge to the employees. Since the taxpayer does not qualify for the food for human consumption exemption, it owes sales tax on the cost of the food originally purchased from the grocery.

FINDING

The taxpayer's protest is sustained in part. The taxpayer's protest to assessed tax on food provided free of charge is denied. The taxpayer's protest that the tax be determined on the cost of the food is sustained. A supplemental audit may be required to determine the cost of the food given away at no charge.

V. Sales/Use Tax - Automobile Purchases

DISCUSSION

The taxpayer purchased a vehicle from a Kentucky dealership. It did not pay sales tax to the Kentucky dealership when it was purchased. The auditor assessed the taxpayer sales tax on the purchase price of the vehicle. The taxpayer claims that it paid sales tax to Indiana on the vehicle when it registered the vehicle with the Indiana Bureau of Motor Vehicles (Exhibit E).

The Department has inspected the taxpayer's Application for Certificate of Title on file with the Bureau of Motor Vehicles which verified that Indiana sales tax has been collected.

FINDING

The taxpayer's protest is sustained.

VI. Sales/Use Tax - Industry Reporting Services

DISCUSSION

The taxpayer protests the use tax assessment on the purchase of an industry reporting service provided by H. The taxpayer provides H with salary, benefits, and compensation package information by answering an extensive questionnaire. H compares the taxpayer's statistics with standards in the industry. The standards have already been established through H's prior research. H generates a detailed report that compares the taxpayer's compensation package to others in the industry. (See Exhibit F).

The taxpayer asserts that the transaction is not taxable because it is being provided with a service. The taxpayer claims that it is not purchasing tangible personal property, much like when an attorney provides a report to a client.

Administrative Regulation 45 IAC 2.2-4-2 provides that, professional services, personal services, and services in respect to property not owned by the person rendering such services are not transactions of a retail merchant constituting selling at retail, and are not subject to gross retail tax.

In this case, H is performing an analysis service for the taxpayer. H obtains the taxpayer's confidential information, manipulates it, and compares it to other companies in the Taxpayer's industry. The true object of the transaction is not the report itself but the analysis of the taxpayer's salary, benefits and compensation package. This analysis allows the taxpayer to compare itself to other companies in its industry.

FINDING

The taxpayer's protest is sustained.

VII. Sales/Use Tax - Printed Materials

DISCUSSION

The taxpayer hired R to develop and implement marketing strategies, convert and sort a target list of prospective customers, design, print, personalize, insert, and mail advertising mailers from Virginia to Indiana residents (Exhibits G&H). In addition to the mailers, R also prints the database for telemarketing purposes. Once the Indiana residents respond to the mailers, R analyzes the demographic information and provides the taxpayer with results on the effectiveness of the mailers with information on what types of people should be targeted in the future. The taxpayer asserts that (1) no sales tax is due on the transaction because it is purchasing a service from R, an out of state printer, and no retail transaction exists, and (2) if a unitary retail transaction is found to exist, only the tangible personal property may be taxed because the true object of the transaction is the service and R paid sales tax on the material when it purchased it in Virginia.

The audit division assessed use tax on the entire contract price between R and the taxpayer.

Purchase of a Service

The taxpayer claims that it purchased a service from R and that it was R that sent the printed material into Indiana. The taxpayer claims that R printed and mailed mailers to Indiana residents in the provision of its marketing service to the taxpayer and that R paid sales tax on the printing material in Virginia when it was purchased.

Information Bulletin #54, section II (1) addresses out of state printers. It states:

> When an Indiana customer engages the services of an out-of-state printer to print promotional materials and deliver these materials to a common carrier for shipment to residents both inside Indiana and outside Indiana, the materials shipped to Indiana residents are subject to use tax. The Indiana customer must pay the use tax directly to the Department of Revenue based on the purchase price of the catalogs.

The Court in D.H. Holmes v. McNamara, 108 S.Ct. 1619 (1988), affirmed the states ability to tax transactions where promotional materials were shipped free of charge to recipients as instructed by the purchaser.

The taxpayer claims that it is entitled to credit for sales tax paid to Virginia. The sales tax paid by R was paid in error since it was purchasing material for resale. The taxpayer also argues use tax was incorrectly assessed under IC 6-2.5-3-5(a) for use tax paid to the State of Virginia for which no Indiana credit was given. IC 6-2.5-3-5(a) states:

> A person is entitled to a credit against the use tax imposed on the use, storage, or consumption of a particular item of tangible personal property equal to the amount, if any, of sales tax, purchase tax or use tax paid to another state, territory, or possession of the United States for acquisition of that property.

The basis for the auditor's assessment on the merchandise for which Virginia sales tax had been paid, was tax had erroneously been paid by R to a Virginia printer, and thus a refund from Virginia should have been sought. While the taxpayer is correct in asserting that normally credit should be given for tax paid to another state, the statute is silent on procedure for tax paid in error. However, considering the fact the error in payment lies with R, the Department is not required to offer the taxpayer credit.

Unitary Transaction

R provided the taxpayer with both tangible personal property and services. The tangible personal property are the advertisements themselves and the services are the preparation, printing, and market analysis once the responses to the mailers are received. Under IC 6-2.5-1-1(a), a unitary transaction exists. A unitary transaction "includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated." In this case, R billed the taxpayer under one lump sum.

The Indiana Tax Court addresses the taxation of unitary transactions under Cowden and Sons Trucking v. Indiana Department of State Revenue, 575 N.E.2d 718, 720 (Ind. Tax Ct. 1991). In Cowden, the taxpayer provided its customers with gravel and the transportation of that gravel. The taxpayer received compensation for transportation services, but received no profit on the sale of the gravel. The court held that the taxpayer was a retail merchant selling at retail, providing a retail unitary transaction not subject to sales tax because the transactions were not

inextricable and indivisible according to the taxpayer's records and the facts presented. Id. at 723.

The Cowden court states that under Martin Marietta Corp. v. Indiana Department of State Revenue, 398 N.E.2d 1309 (Ind. App. Ct. 1979), . . non-taxable services are not suddenly taxable merely because they are part of a unitary transaction. Cowden at 723. . . . legislature intends to tax services rendered in a retail unitary transaction only if the transfer of property and rendition of services is inextricable and indivisible. Cowden at 722.

In this case, services are performed before and after the provision of property. Generally, those services performed before the provision of property are inextricable, thus taxable, and those performed after the provision of services are extricable, thus not taxable. Id. However, in this case, the amount charged for services provided after the provision of property cannot be determined because the costs of each are not provided on the R invoices.

In looking at the factors Cowden used to determine the extractability of Cowden's transactions, the Department finds: (1) no intent of R or the taxpayer to treat the transactions separately, and (2) no support that R does not frequently provide property in its business transactions.

Under the Cowden Test, the services and property provided to the taxpayer are inextricable.

FINDING

The taxpayer's protest is denied.

VIII. Sales/Use Tax - Printed Materials

DISCUSSION

The taxpayer contracts with E, an Indiana vendor, to print various letters outlining charges in credit terms and other printed material. E sent the material to a Nebraska company that inserts the material into envelopes and sends them to the taxpayer's customers. The auditor assessed use tax on the materials claiming that the taxpayer used the material in Indiana.

The taxpayer asserts that the materials are used solely outside Indiana when the Nebraska company inserts the envelopes and mails them to Indiana residents. The taxpayer claims that once in Indiana, it has no control over the printed material. The taxpayer claims that since the taxpayer authorized a credit card statement processing vendor rather than a printer to send the materials to the ultimate recipient, the transaction does not fall under the scope of Information Bulletin #54 and is therefore, not taxable.

The ownership of the inserts is determinative of whether the taxpayer is liable for use tax on the items sent into Indiana. Information Bulletin #54 is based on the Court's decision in D.H. Holmes v. McNamara, 108 S.Ct. 1619 (1988), which affirmed the states ability to tax

transactions where promotional materials were shipped free of charge to recipients as instructed by the purchaser.

In this case, the taxpayer has ultimate control over the printed material and could direct the Nebraska company where to send the materials. The fact that the materials were mailed by someone other than the printer on behalf of the purchaser does not make the transaction non-taxable. The taxpayer had the power to recall the materials, change the addresses they were sent to, or even cancel the mailing.

The taxpayer directs E to deliver the material to its customers in Indiana. The taxpayer is the one getting use from the materials. The taxpayer is gaining advertising from the materials.

Since the taxpayer purchased the materials from an Indiana printer, to ultimately be used in Indiana, the taxpayer must pay use tax to the printer when he purchased them. The printed materials are being used in Indiana and are therefore not being used for an exempt purpose. Since the taxpayer did not pay use tax on the materials when it purchased them from the printer, it must pay the use tax directly to the state.

However, according to Exhibit I, only 75% of the materials are sent to Indiana residents. Therefore, only 75% of the materials are subject to use tax.

FINDING

The taxpayer's protest is sustained in part. Only 75% of the printed materials are subject to use tax.

IX. Sales/Use Tax - Plant Maintenance Services

DISCUSSION

The taxpayer has contracted with ZFC to provide maintenance to the taxpayer's many plants. The taxpayer primarily purchases its maintenance service from ZFC. ZFC was contracted by the taxpayer to visit its various locations every month to water and feed the plants. ZFC was instructed to keep the plants healthy and trimmed so that they add to the aesthetics of the taxpayer's banks.

The invoices from ZFC state that services were provided in the form of maintenance. The invoices provided do not show that a sale of plants existed. Administrative Code 45 IAC 2.2-4-2 provides that, professional services, personal services, and services in respect to property not owned by the person rendering such services are not transactions of a retail merchant constituting selling at retail, and are not subject to gross retail tax.

In this case, it seems that the audit was based on billing statements that did not specify the nature of the transactions. Further examination shows that the purchases were for plant maintenance

services, not for the sale or lease of plants. Therefore, the services are not subject to sales or use tax.

However, some of the purchases from ZFC are for plants. For example, on page 16 of the audit report, there are purchases from ZFC that are described as, Silk Xmas arrangement, Christmas display prop rental, and flowers for employee party. On page 33 of the audit report, there are purchases described as, Xmas Party Flowers and Poinsettias Xmas decorations. On page 43, an item is described as, Floral arrangements. These items are for purchases of flowers and are subject to use tax.

FINDING

The taxpayer's protest is sustained in part. Items for plant maintenance are exempt from assessed tax but items for the sale or rental of plants on pages 16, 33, 43, and any other item on other pages meeting this criteria is taxable.